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# In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1098 and No. 79-1099

JAMES A. CHUTE, ADMINISTRATOR OF THE ESTATE OF JAMES L. CHUTE, ET AL.,
PETITIONERS,

*v.*

UNITED STATES OF AMERICA,
RESPONDENT.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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# In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1098 and No. 79-1099

JAMES A. CHUTE, ADMINISTRATOR OF THE ESTATE OF JAMES L. CHUTE, ET AL.,
PETITIONERS,

*v.*

UNITED STATES OF AMERICA,
RESPONDENT.

**PETITIONERS PRAY THE WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED ON NOVEMBER 26, 1979**

## Citations to Opinions Below

The opinion of the United States District Court for the District of Massachusetts is printed in Appendix B hereto and is reported in 449 F.Supp. 172 (D. Mass. 1978).

The opinion of the Court of Appeals which reversed the judgment of the District Court is printed in Appendix A hereto and is reported at 610 F.2d 7.

## Jurisdiction

The judgment of the Court of Appeals was entered on November 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## Questions Presented

I. When the Secretary of Transportation (via the Coast Guard) exercises his discretionary powers pursuant to 14 U.S.C. § 86, is the duty of care required in marking an obstruction to navigation the duty set forth in *Lane* v. *United States,* 529 F.2d 175 (4th Cir. 1975), or that set forth in *Chute* v. *United States* (Appendix A, hereto)? That is, when the Secretary of Transportation (acting through the Coast Guard) chose to attend to the remains of the PC1203, were his agents obligated to act in a responsible manner when choosing a navigational aid (*Lane*) or was the choice of navigational aid solely a matter of executive discretion, not subject to review by the courts except in "extreme cases" (*Chute*)?

II. Does a United States military vessel which had been deliberately run aground in navigable waters of the United States by agents of the United States for use as a military bombing target fall within the purview of 33 U.S.C. § 409 when it is no longer used as a bombing target? That is, when the PC 1203 ceased to be used as a bombing target by the United States was it at that time a "wreck" for purposes of requiring its owner, the United States, to attend to its remains in a manner consistent with the obligations required of a vessel owner by 33 U.S.C. § 409?

## Statutes Involved

The federal statutes involved are 14 U.S.C. § 86 and 33 U.S.C. § 409. These statutes are printed in Appendix C.



## Statement of the Case

Suit was commenced in the United States District Court for the District of Massachusetts for the wrongful deaths of two persons after a 24′ pleasure boat struck the remains of an old navy patrol craft, the PC 1203, on September 30, 1971. The PC 1203 had been deliberately run aground in 1949 by agents of the United States (owner of the vessel) for use as a military bombing target. The site was Horseshoe Shoals, Nantucket Sound, about 7-8 miles south of Hyannis Port, MA.

Plaintiffs, administrator and administratrix, respectively, of the estates of the two decedents, brought suit against the United States pursuant to, *inter alia,* the Suits in Admiralty Act, 46 U.S.C. §§741-752, alleging that the marking of the remains of the wreck by the United States Coast Guard with a small buoy 100 yards from the wreck was an irresponsible, improper and inadequate warning of the wreck's location and thereby served to mislead the boating public. Plaintiffs alleged that this method of marking this wreck amounted to negligence and that this negligence proximately caused the vessel in which plaintiffs' decedents were passengers to strike the wreck's remains and sink, thereby causing the deaths of plaintiffs' decedents.

The District Court held that the accident and deaths of plaintiffs' decedents were caused by the defendant's negligent marking of the remains of the navy vessel, PC 1203. *Chute* v. *United States,* 449 F.Supp. 172, 185 (D. Mass. 1978). The District Court reasoned that the statutory language of 33 U.S.C. § 409 did not give the Coast Guard "free rein" to choose the method of marking the sunken vessel. *Chute* v. *United States,* 449 F.Supp. 172, 185 (D. Mass. 1978). That Court ruled that "[O]nce the Coast Guard chose to exercise its discretion to warn mariners of the danger posed by the wreck, it had an obligation to do so properly." *Chute, supra,* 449 F.Supp. at 186. Having failed to either mark the wreck with a 15′ daymark (rather

than a 3½′ can buoy) or remove the remains of the wreck, the District Court found the defendant liable for the accident and ensuing deaths. *Chute, supra,* 449 F.Supp. at 186.

The Circuit Court of Appeals reversed the judgment of the District Court. The Circuit Court reasoned that 33 U.S.C. § 409, wherein an owner of a sunken vessel has a duty to mark and commence its removal, was not applicable. In the Court's view, 33 U.S.C. § 409 was not applicable because the PC 1203 was not "a wreck". That is, the vessel was sunk deliberately for use for a "proper government purpose," to wit, a bombing target and not "by reason of collision or other peril of the sea, or simply abandoned in shallow water as an inexpensive means of disposal." *Chute* v. *United States,* App. A, p. 16.

The Circuit Court then addressed the applicability of 14 U.S.C. § 86. Resting its holding on this provision, the Court, declining to examine the appropriateness of the marker used by the Coast Guard to mark the vessel, declared that the choice of navigational aid was within the executive discretion of the Coast Guard and "must in all ordinary cases be final." *Chute* v. *United States,* App. A, pp. 19-22. The Circuit Court expressly refused to follow the Fourth Circuit in *Lane* v. *United States,* 529 F.2d 175 (4th Cir. 1975), referring to that part of the *Lane* opinion that the "Coast Guard is to exercise (its) discretion responsibly" as "judicial gloss" and rejected the *Lane* Court's holding. *Chute* v. *United States,* App. A., pp. 20-21.

Thus this case, as presented before this Honorable Court, falls within two of the character of reasons for review on writ of certiorari set forth in Rule 19(1)(b) of the Rules of the Supreme Court of the United States. First, the decision in the case at bar is in conflict with the decision of the United States Court of Appeals for the Fourth Circuit in *Lane* v. *United States,* 529 F.2d 175 (4th Cir. 1975), insofar as both purport to define the duty of care required of the Secretary of Transportation by 14 U.S.C. § 86 in



exercising his executive discretion. Second, by ruling that the PC 1203 was not "a wreck" within the meaning of 33 U.S.C. § 409, the United States Court of Appeals for the First Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

## Argument

### I. When the Secretary of Transportation (via the Coast Guard) Chose To Mark the Remains of the PC 1203 the Government Was Obligated To Carry Out the Duty of Marking in a Responsible Manner.

Judge Campbell succinctly states Plaintiffs' case in the opinion of the Court of Appeals (App. A, pp. 18-19):

> . . . Plaintiffs argue . . . and the district court agreed with them, that while 14 U.S.C. § 86 allows the government some measure of discretion in deciding whether or not, and how, to mark an obstruction, its discretion is subject to a judicially enforceable obligation to exercise it responsibly. Marking the PC 1203 with a three and one-half foot tall buoy located one hundred yards away is said to have been an irresponsible response to the danger posed by the wreck remains and consequently a violation of the duty of responsible conduct thought to be imposed upon the Coast Guard by 14 U.S.C. § 86. In contending that a daymark 15 feet tall was required to mark the PC 1203, plaintiffs point out that many pleasure fishing boats used the Horseshoe Shoals area for fishing, that a local harbormaster and others had complained to the Coast Guard about the difficulty of pinpointing the wreck solely by reference to the nearby buoy, and that Captain Houtsma, a former Coast Guard officer called by plaintiff as an expert, testified that the buoy was inadequate and that a daymark was both feasible and far superior.

The portion of the statute directly at issue is as follows:

> The Secretary may mark for the protection of navigation any sunken vessel or other obstruction existing on any navigable waters of the United States in such manner and for so long as, in his judgment, the needs of maritime navigation require. . . . (As amended September 17, 1965, Pub.L. 89-191, 79 Stat. 82, Prior to 1974 Amendment.)

In ruling that the facts of the case *sub judice* fell solely within the scope of 14 U.S.C. § 86, the Circuit Court refused to permit judicial examination of the method chosen to mark the remains of the PC 1203, and therefore reversed the District Court's finding of liability. (*Chute,* App. A, pp. 18-21).

Judge Campbell, on behalf of the *Chute* Court, analyzed the language of the statute and concluded that the 1965 amendment thereto, ". . . plainly entrusts those matters to the judgment of the Secretary, not the courts." (*Chute,* App. A, p. 19). Judge Campbell ruled that the Secretary's judgment was not subject to judicial review except in "extreme cases", the statute permitting ". . . no basis for inferring a grant of judicial authority in a case such as the present to second-guess the Secretary's judgment that a buoy rather than a daymarker was the preferable way of marking this wreck." (*Id.*).

The *Chute* Court expressly noted that its decision was in direct conflict with that of the Fourth Circuit in *Lane* v. *United States,* 529 F.2d 175.[1] While quoting *Lane's* statement that 14 U.S.C. § 86 ". . . is readily susceptible to a construction that the Secretary of Transportation, acting through the Coast Guard, is to exercise his discretion responsibly" (*Lane* v. *United States, supra,* 529 F.2d at 179)

[1] The plaintiff in *Lane* brought suit under the Suits in Admiralty Act for damages after his cabin cruiser collided with an unmarked, sunken barge owned by the United States.



the *Chute* Court opined that this construction of the statute ". . . takes with one hand the discretion given with the other; while its authority is called discretionary, the Coast Guard is directed to exercise its discretion in a manner satisfactory to the Court . . ." (*Chute,* App. A, pp. 20-21). In labelling *Lane's* analysis "judicial gloss", the *Chute* Court opted for a laissez faire attitude, stating, "If the Coast Guard's executive discretion is to remain meaningful at all, its choice as to when to mark and what navigational aid to employ must in all ordinary cases be final." (*Id.*)

It is respectfully submitted that the *Chute* Court erred in refusing to follow *Lane,* concurrently creating a conflict between the decisions of the respective courts of appeals. The nature of the conflict between the Circuits is such that under *Chute* the decision to and method of marking of a sunken vessel or other obstruction to navigation is solely within the discretion of the Secretary of Transportation while under *Lane,* the Secretary is obligated to act in a responsible manner. The effect of the decisions of the First and Fourth Circuits in *Chute* and *Lane* is to create differing standards of care relative to the obligations of the Secretary of Transportation pursuant to 14 U.S.C. § 86. Such conflict is inconsistent with a basic tenet of the admiralty law, to wit, uniformity. See, e.g., *Southern Pacific Co.* v. *Jensen* (1917) 244 U.S. 205, 37 S.Ct. 524.

## II. The Defendant, United States, as Owner of a Military Vessel Which Was Deliberately Run Aground in the Navigable Waters of the United States for Use as a Military Bombing Target, Was Obligated To Mark the Vessel's Remains in a Careful and Prudent Manner When Its Use as a Bombing Target Was Concluded.

The United States Court of Appeals for the First Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. The

Court of Appeals deemed the PC 1203 an obstruction, but not "a wreck in the normal sense." (*Chute* v. *United States*, App. A, p. 16). On this basis the Court ruled that the requirements placed by Congress on an owner of a sunken vessel to mark, and remove its remains, pursuant to 33 U.S.C. § 409 did not apply to the United States as owner of the PC 1203.[2]

The pertinent portions of 33 U.S.C. § 409 are as follows:

> . . . [W]henever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently. . . .

The *Chute* Court ruled the statute inapplicable because the PC 1203 was originally "wrecked and sunk" upon Horseshoe Shoals for a "proper governmental purpose" (*Id.* at p. 16). What the Court does not address is the question of the applicability of the statute after the "proper governmental purpose" is concluded.

In this case the PC 1203 ceased to be a bombing target in 1961, 10 years before the accident giving rise to this suit. That is, the "proper governmental purpose" for deliberately grounding the PC 1203 on Horseshoe Shoals

[2] The issue with respect to whether 33 U.S.C. § 409 applies to the United States as owner of a sunken vessel was answered in the affirmative by the United States Supreme Court in *Eastern Transp. Co.* v. *United States* (1927), 272 U.S. 675.



was abandoned by 1961. During this 10 year period two separate buoys were emplaced to mark the remains of the PC 1203. After the accident the government dynamited the balance of the remains. It is Petitioners' contention that the Respondent's conduct in attending to the remains of the PC 1203 during this 10 year period was governed by the obligations imposed upon an owner of a vessel by 33 U.S.C. § 409.

The Circuit Court in *Chute* has narrowly interpreted a statute which seems to have been intended to obligate an owner to remove a vessel which was caused to be an obstruction to navigation, regardless of how the obstruction came to be there. The *Chute* Court's reasoning is questionable for it recognizes the obligations imposed by 33 U.S.C. §409 in the event of collision, natural disaster, or abandonment on the one hand but not when the vessel becomes an obstruction by means of an intentional act (albeit as a result of a proper governmental purpose) once the initial, legitimate purpose has ceased to exist.

The question of whether a vessel sunk by the U.S. Navy for use as a bombing target or any other legitimate governmental purpose constitutes a wreck under 33 U.S.C. § 409 once the original purpose for creating the obstruction ceases to exist, is an important question of federal law which should be settled by this Court.

## Conclusion

The Circuit Court's decision in *Chute* has served to create a conflict between at least two Circuit Courts of Appeals in defining the duties of care owed by a governmental agency pursuant to 14 U.S.C. § 86. The *Chute* Court has also decided an important question of law pursuant to 33 U.S.C. § 409 which has not been, but should be, decided by the United States Supreme Court.

For the reasons cited in the foregoing brief it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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**APPENDIX A**

# United States Court of Appeals

## For the First Circuit

No. 79-1098

JAMES A. CHUTE, ADMINISTRATOR OF THE ESTATE OF JAMES L. CHUTE, ET AL.,

PLAINTIFFS, APPELLEES,

*v.*

UNITED STATES OF AMERICA,

APPELLANT.

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No. 79-1099

JAMES A. CHUTE, ADMINISTRATOR OF THE ESTATE OF JAMES L. CHUTE, ET AL.,

PLAINTIFFS, APPELLANTS,

*v.*

UNITED STATES OF AMERICA,

APPELLEE.

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APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. FRANK H. FREEDMAN, *U.S. District Judge*]

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Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

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*Joseph G. Abromovitz*, with whom *Latti and Flannery*, was on brief, for James A. Chute, Etc., et al.

*David V. Hutchinson*, Attorney, Civil Division, Department of Justice, with whom *Barbara Allen Babcock*, Assistant Attorney General, *Edward F. Harrington*, United States Attorney, and *Leonard Schaitman*, Attorney, Civil Division, Department of Justice, were on brief, for the United States.

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November 26, 1979

CAMPBELL, *Circuit Judge.* Plaintiffs' decedents were passengers on a sports fishing boat which sank after striking the remains of a vessel scuttled in 1949 by the United States Navy for use as a bombing target and thereafter abandoned. Holding that the accident and ensuing fatalities were caused by the United States' failure adequately to mark (or else to remove) the sunken hazard, the district court awarded damages.[1] The United States has appealed.

The accident happened in the following manner. On September 30, 1971, plaintiffs' decedents accompanied their friend, Dr. Baxter, in his boat, the AD LIB II. for a day of fishing. After fishing four to five hours in Nantucket Sound, approximately seven to eight miles southwest of Hyannisport, Massachusetts, Dr. Baxter and his party headed home. The weather was hazy, not foggy, with visibility of some seven or eight miles. Dr. Baxter did not know his precise location, but he believed he was in the vicinity of Horseshoe Shoals somewhat south of the charter location of the submerged wreck which he later struck.[2] He headed the vessel in a north-northeast direction on a course of 30° magnetic at a semi-planing speed of 14 knots. In the distance he could see a familiar tower on a hill and decided his course would take him back to

[1] The district court's opinion appears at 449 F. Supp. 172 (D. Mass. 1978). The United States' consent to suit in the circumstances of this case was based on the Suits in Admiralty Act, 46 U.S.C. §§ 741-752. *Chute* v. *United States,* 449 F.Supp. 172, 175 (D. Mass. 1978).

[2] Dr. Baxter was an experienced boatman, having fished in the Nantucket Sound area for some 40 years and knew the wreck was on the shoals. He had taught local courses in navigation as a member of the United States Power Squadrons and knew that a wreck buoy is not placed on top of a wreck—information which would, in any event, be obvious from the chart, U.S. Coast and Geodetic Survey Chart 1209, 18th Edition, August 22, 1970, which contained a symbol portraying the location of the wreck and another symbol depicting the location of the wreck buoy. Dr. Baxter testified to having a chart, as would of course be expected of any boatsman operating in those waters.



Hyannisport.[3] Shortly thereafter, he was surprised to notice he was in shallow water, and moments later he heard the vessel strike something.

The district court found, and it is not now questioned, that the obstacle which the AD LIB II hit was the sunken remains of a United States Navy patrol craft, PC 1203, which in 1949 was deliberately grounded on Horseshoe Shoals by the United States for use as a bombing target. The charted depth in the vicinity of the wreck was only two feet at mean low water, with a tidal range of an additional 2.8 feet. In 1961 the Navy had ceased bombing practice in that area and had removed the restrictions on public access; however, it did not remove the remains of the wreck which were not visible above water. While Horseshoe Shoals is outside normal shipping channels —parts of it being so shallow as virtually to preclude navigation—it is, nonetheless, much frequented by small, pleasure-fishing craft. A few years after the Navy ceased to make use of the wreck, the Coast Guard, at the request of local interests, established a buoy to mark it. Even after the buoy was established, however, some people expressed concern that an accident might occur.

At the time of this accident the wreck was marked by a red and black buoy which projected three feet six inches above the water. The buoy's charted position was 100 yards, 315° True from the wreck, and it was on station at the time of the accident. Dr. Baxter testified that he did not see the buoy prior to striking the wreck, although after the AD LIB II sank the survivors saw it and one of them swam to it. The district court rejected the government's contention that Dr. Baxter's negligence was the

[3] The tower is shown on the chart. A bearing to the tower, plotted on the chart, would have indicated whether the AD LIB II was on a course which would clear the wreck, but Dr. Baxter apparently felt confident enough of his position not to make any such calculation or indeed to consult his chart.

cause of the sinking of the AD LIB II. In the court's view, he was not negligent at all. It surmised that Dr. Baxter had failed to see the wreck buoy because "[t]he accident area was one that was subject to rips or swells which could easily have concealed a buoy which was only some three and one-half feet above the water's surface." *Chute* v. *United States,* 449 F. Supp. 172, 182 (D. Mass. 1978). While there was no testimony that the buoy had in fact been so obscured, or indeed that Dr. Baxter had vigilantly looked for it, Dr. Baxter testified that if he had seen the buoy he would have altered his course.[4] The court was apparently persuaded that if an experienced boatsman such as Dr. Baxter did not observe the buoy, it must have been in some way obscured. Thus, although the buoy was in fact present and on station, the court said Dr. Baxter had relied to his detriment upon the "absence" of the wreck buoy, " 'the one "landmark" which would not only pinpoint his location but also pinpoint the one known hazard in the area.' " *Id.* at 183. The court held that once the Coast Guard "chose to exercise its discretion to warn mariners of the danger posed by the wreck," it "should have either erected a daymark rising some 15 feet above the water immediately adjacent to the wreck or else demolished the PC 1203 remains completely," *id.* at 186; its failure to do either made it responsible for the collision and liable in damages to plaintiffs.

The legal basis for these conclusions, as set out in the district court's opinion, appears to be an amalgam of 14 U.S.C. § 86, a statute authorizing the Coast Guard to mark wrecks, 33 U.S.C. § 409, a statute prescribing the duties of owners of wrecked vessels, and *Indian Towing Co.* v. *United States,* 350 U.S. 61 (1955), a case holding

[4] In response to the question whether he considered the buoy irrelevant to the accident Dr. Baxter stated: "I don't know. If I had seen that buoy, I certainly wouldn't have continued that course."



the government liable for negligently failing to maintain a navigational aid after inducing reliance thereon. As we conclude the government is not liable under any of these theories, we reverse.

We commence with a brief overview of certain statutory provisions pertaining to obstructions of navigable waters. Section 403 of title 33 proscribes the "creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States . . . ." Other sections of the same title deal with particular types of obstructions—such as bridges, dams, dikes (§ 401), refuse (§ 407), sunken vessels (§ 409)—and prescribe the duties and liabilities of those responsible for an unlawful obstruction. Under § 409 an owner of a vessel sunk "accidentally or otherwise" is required to mark the vessel "with a buoy or beacon" and to commence its immediate removal. Violation of the statutory duties is evidence of negligence and may give rise to civil tort liability. *Ingram Corp.* v. *Ohio River Co.,* 505 F.2d 1364 (6th Cir. 1974); *Humble Oil & Refining Co.* v. *Tug Crochet,* 422 F.2d 602 (5th Cir. 1970); *Morania Barge No. 140, Inc.* v. *M&J Tracy, Inc.,* 312 F.2d 78, 80 (2d Cir. 1962) (§ 409 reflects a legislative judgment of the standard of care to which owners of sunken vessels should be held in civil actions); *Sullivan* v. *P. Sanford Ross, Inc.,* 263 Fed. 348, 350 (2d Cir.), *cert. denied,* 253 U.S. 492 (1920) (discussing duty of care of owner of sunken vessel); *Lauritzen* v. *Chesapeake Bay Bridge & Tunnel District,* 259 F. Supp. 633, 638 (E.D. Vir. 1966), *aff'd in part; rev'd in part,* 404 F.2d 1001 (4th Cir. 1968). The United States too is subject to liability for violation of the statutory duties. *Eastern Transportation Co.* v. *United States,* 272 U.S. 675, 692-93 (1927) (an action may be maintained under the Suits in Admiralty Act against the United States for a tort caused by the government's negligence in dealing with one of its

wrecked vessels and its failure to comply with its own navigational laws); *The Snug Harbor,* 40 F.2d 27 (4th Cir. 1930).

Thus, if we were to view the instant obstruction as a wreck in the normal sense—that is, a vessel sunk by reason of collision or other peril of the sea, or simply abandoned in shallow water as an inexpensive means of disposal—the PC 1203 would then be within the ambit of 33 U.S.C. § 409 and a failure to comply with the marking and removal requirements of that section would render the government, like a private party, liable to suit. The present situation is, however, different. The PC 1203 was deliberately put on the shoal by the Navy as a bombing target. We assume, since there is no evidence to the contrary, its action in so doing was pursuant to proper authority. The absolute prohibition in § 409 against sinking a vessel in a navigable channel[5] is obviously not intended to derogate from the federal government's power to place structures in otherwise navigable channels pursuant to its lawful authority. By the same token, the § 409 requirement that a wreck be promptly removed is obviously not applicable to an obstruction which the government placed there for a proper governmental purpose. The situation, indeed, is less analogous to that of a wrecked vessel as contemplated in the statute than to that of an authorized obstruction placed in a navigable channel pursuant to federal license or, as in this case, by the federal government itself. We conclude that § 409 is neither controlling nor of much help by analogy.

[5] We disagree, however, with the government's position that this was not a navigable channel. The term "navigable channel" in § 409 is not limited to the dredged, buoy marked channels to which commercial vessels are confined. *Lane* v. *United States,* 529 F.2d 175, 179 (4th Cir. 1975); *United States* v. *Raven,* 500 F.2d 728 (5th Cir. 1974), *cert. denied,* 419 U.S. 1124 (1975); *Red Star Towing & Transportation Co.* v. *Woodburn,* 18 F.2d 77 (2d Cir. 1917). We need not consider, in view of our disposition, whether the wreck was in territorial waters or, if not, whether that matter is material.



We turn next to the plaintiffs' contention that the government violated the duties imposed by 14 U.S.C. § 86. At the time of the accident, 1971, 14 U.S.C. § 86 provided,

> "the Secretary [of Transportation] *may* mark for the protection of navigation any sunken vessel or other obstruction existing on any navigable waters of the United States *in such manner and for so long as, in his judgment,* the needs of maritime navigation require. The owner of such an obstruction shall be liable to the United States for the cost of such marking until such time as the obstruction is removed or its abandonment legally established or until such earlier time as the Secretary may determine. All moneys received by the United States from the owners of obstructions, in accordance with this section, shall be covered into the Treasury of the United States as miscellaneous receipts. This section shall not be construed so as to relieve the owner of any such obstruction from the duty and responsibility suitably to mark the same and remove it as required by law." [Emphasis added.]

Pub. L. No. 89-181, 79 Stat. 822 (1965) (prior to 1974 amendment).

Plaintiffs concede that this statute does not impose upon the United States a mandatory duty to mark every unremoved wreck in navigable waters.[6] *Compare Lane* v.

[6] Prior to the 1965 amendment, 14 U.S.C. § 86 was written in mandatory terms. It stated in material part:

> "As soon as the abandonment of [any sunken vessel or other similar obstruction existing on any navigable waters of the United States] has been . . . established, the Secretary of the Army *shall* keep the same so marked pending removal thereof . . . ." [Emphasis added.]

Pub. L. No. 207, 63 Stat. 501 (1949) (prior to 1965 amendment). Accordingly, cases decided prior to the 1965 amendment state

*United States,* 529 F.2d 175, 178 (4th Cir. 1975). They acknowledge that, generally, the Coast Guard has no duty to establish an aid to navigation and cannot be held liable for failing to do so. *See* 14 U.S.C. § 81 ("the Coast Guard *may* establish, maintain, and operate . . . aids to maritime navigation . . . ." (emphasis added) ); *Afran Transport Co.* v. *United States,* 309 F. Supp. 650, 654 (S.D.N.Y. 1969) (dicta), *aff'd,* 435 F.2d 213 (2d Cir. 1970), *cert. denied,* 404 U.S. 872 (1971); *Kommanvittselkapet Harwi (Rolf Wigand)* v. *United States,* 305 F. Supp. 882, 894 (E.D. Penn. 1969), *aff'd,* 467 F.2d 456 (3d Cir. 1972), *cert. denied,* 411 U.S. 931 (1973); *annot.,* 19 ALR Fed. 297, 312-13 (1974). Plaintiffs argue, however, and the district court agreed with them, that while 14 U.S.C. § 86 allows the government some measure of discretion in deciding whether or not, and how, to mark an obstruction, its discretion is subject to a judicially enforceable obligation to exercise it "responsibly." Marking the PC 1203 with a three and one-half foot tall buoy located one hundred yards away is said to have been an irresponsible response to the danger posed by the wreck remains and consequently a violation of the duty of "responsible" conduct thought to be imposed upon the Coast Guard by 14 U.S.C. § 86. In contending that a daymark 15 feet tall was required to mark the PC 1203, plaintiffs point out that many pleasure fishing boats used the Horseshoe Shoals area for fishing, that a local harbormaster and others had previously complained to the Coast Guard about the difficulty of pinpointing the wreck solely by reference to the nearby buoy, and that

that the government has a mandatory duty to mark or remove a wreck. *See, e.g., Somerset Seafood Co.* v. *United States,* 193 F.2d 631, 635 (4th Cir. 1951); *United States* v. *Travis,* 165 F.2d 546 (4th Cir. 1947); *Jones Towing* v. *United States,* 277 F. Supp. 839, 848 (E.D. La. 1967) (collision with wreck occurred in 1964); *Wheeldon* v. *United States,* 184 F. Supp. 81, 84 (N.D. Cal. 1960) (suit does not lie under Federal Tort Claims Act for violation of mandatory duty to keep all abandoned wrecks suitably marked).



Captain Houtsma, a former Coast Guard officer called by plaintiff as an expert, testified that the buoy was inadequate and that a daymark was both feasible and far superior.

The foregoing approach, however, would seem to read something into the statute that is not there. The 1965 amendment providing that the Secretary of Transportation "may" mark sunken vessels "in such manner and for so long as, *in his judgment,* the needs of maritime navigation require" (emphasis added) plaintiff entrusts these matters to the judgment of the Secretary, not the courts. To be sure, there may be extraordinary circumstances in which the Secretary has acted so irresponsibly as to abuse his discretion, but if the grant of discretion is to mean anything, the Secretary's judgment must stand in all but extreme cases. The statute affords no basis for inferring a grant of judicial authority in a case such as the present to second-guess the Secretary's judgment that a buoy rather than a daymarker was the preferable way of marking this wreck. Nor does the statute mandate a decision to remove every wreck that may conceivably cause harm. The coastal waters are strewn with wrecks, shoals, rocks, bars and every manner of navigational hazard. Assuming they are properly charted, not all can be otherwise warned against. Even as to those that are, there are various degrees of protection. Courts have neither the expertise, the information, nor the authority to allocate the finite resources available to the Secretary among competing priorities. *Cf. United States* v. *Sandra & Dennis Fishing Corp.,* 372 F.2d 189, 195 (1st Cir.), *cert. denied,* 389 U.S. 836 (1967) ("[h]ow much equipment the Coast Guard is to possess, and how much money it is to spend, measured, necessarily, by Congressional appropriations, must be for the government's uncontrolled discretion").

We recognize that the Fourth Circuit takes a different view. *See, e.g., Lane* v. *United States,* 529 F.2d 175, 179

(4th Cir. 1975). The plaintiff in the *Lane* case, whose boat sank after striking an unmarked wreck, brought suit under the Suits in Admiralty Act. While professing to recognize that the government did not have a mandatory duty under 14 U.S.C. § 86 to mark every unremoved wreck in navigable waters, the Fourth Circuit stated,

> "The statute [14 U.S.C. § 86], however, is readily susceptible to a construction that the Secretary of Transportation, acting through the Coast Guard, is to exercise his discretion responsibly. He is not to ignore submerged wrecks of which he is informed, or fail to mark them if they constitute real dangers to navigation."

*Id.* at 179.[7] This reading of the statute takes with one hand the discretion given with the other: while its authority is called discretionary, the Coast Guard is directed to exercise its discretion in a manner satisfactory to the court

[7] In accordance with *Lane*, the United States has been held liable for an allegedly irresponsible exercise of the Coast Guard's discretionary authority in failing to mark a ferry cable. *Doyle* v. *United States*, 441 F. Supp. 701 (D.S.C. 1977), and for abusing its discretion by inadequately marking a dike. *Magno* v. *Corros*, 439 F. Supp. 592 (D.S.C. 1977); *see also Offshore Transportation Co.* v. *United States*, 465 F. Supp. 976 (E.D. La. 1979) (United States' failure to mark or remove a charter wreck located in a shoal area generally avoided by navigators was not an abuse of discretion). Other courts have, in passing, referred to the United States' duty in its governmental capacity to mark obstructions in navigable waters but, finding that the obstruction was adequately marked, have not had to decide whether the United States would have been liable in tort had it not been. *Humble Oil & Refining Co.* v. *Tug Crochet*, 422 F.2d 602, 607 (5th Cir. 1970) (if United States had any responsibility after owner's attempted abandonment it at least had the option to remove the wreck or to properly mark it); *Tug Ocean Prince, Inc.* v. *United States*, 436 F. Supp. 907, 922 (S.D.N.Y. 1977), *aff'd in part, rev'd in part*, 584 F.2d 1151 (2d Cir. 1978) (in absence of showing that can-buoy marking rocky obstruction was so ineffective that its choice constituted negligence *per se*, the Coast Guard should not be divested of its executive discretion to choose such aids to navigation as will most effectively and efficiently function within its fixed budgetary limitations).



whenever "informed" of a submerged wreck or of a "real" danger to navigation. We are not persuaded to adopt this judicial gloss. If the Coast Guard's executive discretion is to remain meaningful at all, its choice as to when to mark and what navigational aid to employ must in all ordinary cases be final. We thus see no basis for finding a violation of 14 U.S.C. § 86.[8]

The Coast Guard's broad discretion under § 86 is, to be sure, confined by the requirement that once it undertakes to mark a wreck, it exercise due care to see that the buoys and other navigational aids chosen remain operative and in their established positions. *Greer* v. *United States*, 505 F.2d 90, 92 (5th Cir. 1974); *Afran Transport Co.* v. *United States*, 309 F. Supp. at 654. This is the teaching of *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). The government, just as any private person who undertakes to warn the public of danger and thereby induces reliance,

[8] The government's discretion under § 86 is not lessened by the Suits in Admiralty Act. It is true, as the Fourth Circuit observed, that the Act "subject[s] the United States to libels in personam, not just when a government owned vessel or cargo was involved but in every situation in which, if a private person were involved, a proceeding in admiralty could be maintained," *Lane*, 529 F.2d at 179. But it is 33 U.S.C. § 409, not 14 U.S.C. § 86, which specifies the standards to which private persons are held in marking their own wrecked vessels. *Lane* would be a different case had the vessel there been owned by the United States at the time of its sinking. As owner the United States would, in a proper case, be liable under the Suits in Admiralty Act for injury resulting from a failure to satisfy the requirements imposed by 33 U.S.C. § 409 upon private owners. Here, however, as discussed earlier, *supra* pp. 6-7, § 409 is not applicable to an obstruction originally placed for a proper governmental purpose.

In light of our disposition, we need not determine whether the exception for discretionary functions which we have implied in the Suits in Admiralty Act also defeats a claim against the United States in its governmental (as opposed to ownership) capacity. *Gercey* v. *United States*, 540 F.2d 536, 539 (1st Cir. 1976), *cert. denied*, 430 U.S. 954 (1977). *Compare Lane* v. *United States*, 529 F.2d 175, 179 (4th Cir. 1975).

must not worsen the position of those who have come to rely on the service by carelessly omitting it.

But there is a vast difference between the above proposition and the district court's assumption "that once the defendant decided to mark the wreck it had the duty, pursuant to *Indian Towing* . . . to mark it properly"—meaning, apparently, that the most effective and best means must always be selected. On this premise, the court proceeded to compare the merits of a buoy with those of a daymarker, concluding that a buoy only three and one-half feet tall stationed 100 yards away was not as effective a means of marking the wreck's location as a daymarker.

*Indian Towing* does not support that approach. In that case damage was sustained when a lighthouse light operated by the Coast Guard was negligently allowed to go out. The Supreme Court stated that while the Coast Guard need not have undertaken the lighthouse service, once it had exercised its discretion to operate the light and engendered reliance on the guidance afforded thereby, it was obligated to use due care to make certain the light was kept in good working order. *Indian Towing,* 350 U.S. at 69. The wreck buoy here, however, was concededly on station. *Indian Towing* does not invite, as plaintiffs would have it, an assessment of the appropriateness of the particular navigational aid established; liability was not imposed in that case because a more powerful light or taller lighthouse would have been a better warning of the rocks marked by the lighthouse, but rather because the negligent non-functioning of the charted lighthouse misled plaintiff to his detriment. As we have stated previously, "the principle laid down in *Indian Towing* . . . [is] that the government must not mislead, and must not induce reliance upon a belief that it is providing something which, in fact, it is not providing." *United States* v. *Sandra & Dennis Fishing Corp.,* 372 F.2d 189, 195 (1st Cir.), *cert. denied,* 389



U.S. 836 (1967). Here there was no such inducement. The buoy, of a standard type used by the Coast Guard, was in actuality located precisely as represented on the U. S. Coast and Geodetic Survey Chart 1209, 18th Edition, August 22, 1970. The wreck was marked exactly as it was purported to be, and whether or not that marking is deemed the best suitable from a safety point of view, the United States is not liable under *Indian Towing.*

Nor do we accept plaintiffs' theory, also supposedly bottomed on *Indian Towing,* that Dr. Baxter relied to his detriment "upon the integrity of his chosen course by the *absence* of the buoy." (Emphasis in original.) The buoy was present, not absent. Plaintiffs speculate that Dr. Baxter failed to see the buoy only because it was too small. They would have us believe that like the malfunctioning lighthouse in *Indian Towing,* the buoy failed to function as a warning of danger. The district court apparently agreed, for it concluded that Dr. Baxter's failure to see the buoy was not the result of his negligence. The court stated:

> "The accident area was one that was subject to rips or swells which could easily have concealed a buoy which was only some three and one-half feet above the water's surface. Dr. Baxter testified that he did not see the buoy and, had he seen it, he would have altered his course. Dr. Baxter was thus forced to rely to his detriment upon the absence of the wreck buoy, 'the one "landmark" which would not only pinpoint his location but also pinpoint the one known hazard in the area.' " (Footnote omitted.)

*Chute,* 449 F. Supp. at 182-83.[9]

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[9] To state that the buoy was the one landmark which would pinpoint Dr. Baxter's and the wreck's location was inaccurate. Dr. Baxter could see objects on shore, as he testified. By bearings on these he could have discovered if his course would cross the wreck. See note 3, *supra.* There were also channel buoys, one slightly over a mile away from the wreck buoy, which he might

The district court's conclusion that the three and one-half foot tall wreck buoy was an ineffective warning because the buoy could easily be concealed by rips and swells is pure speculation without adequate support in the evidence and is therefore clearly erroneous. We review the evidence on that subject briefly.

Plaintiffs' expert, a retired yacht captain familiar with Horseshoe Shoals, described a rip as "a disturbance at the surface of the action, other than the wind[,] which makes waves. In other words, it is caused by currents flowing over different depths of water." He stated that the tide rips in Nantucket Sound, which occur mostly because of the configuration of the ocean bottom, are generally constant in their location and are present even when the sea is calm. At certain stages of the flow in the current there is a rip in the area of the wreck which is approximately six to eight inches high when the sea is calm and may be two feet high when the wind is opposing the current, he stated. The rip does not come up to the top of the buoy he added, however, because the buoy floats on top.

While plaintiffs concede that "swells[10] and rips do not obscure buoys because the buoys ride on top of them," plaintiffs argue that "the most logical explanation as to why Dr. Baxter did not see the buoy was the occurrence of a swell or rip between his vessel and the buoy, thereby obscuring his line of sight to the buoy." Not only is this unsupported by the evidence, it is fallacious. Plaintiffs overlook the fact that the eye of the navigator is always well above the water. If the buoy itself rises with the

have been able to see for purposes of taking a bearing. Finally, assuming uncertainty as to his location, he could have proceeded cautiously at a slower speed until clear of the Horseshoe Shoals area and in one of the buoyed channels.

[10] Swell — "a long relatively low wave or an unbroken series of such waves." Webster's Third New International Dictionary (1971).



waves, as is conceded, a wave that would occur somewhere between it and the navigator would have to be as high as the ship in order to cut off his view. Furthermore, it would have to remain there; we are not concerned with a momentary occlusion.

Neither did the testimony of plaintiffs' expert, Captain Houtsma, a retired Coast Guard captain, indicate that the wreck buoy would not have been seen. While Captain Houtsma gave his opinion that the wreck was not properly marked from a safety standpoint, his testimony focused upon the superiority of an alternate type of marking, a fifteen foot high daymark[11] erected immediately adjacent to the remains. Captain Houtsma did state:

> "Well, I don't think you could pass a wreck safely if you have got a buoy 100 yards away from it. That is 500 feet [sic]. This PC is 173 feet. You could be well onto the PC by the time you even knew the buoy was there."

and later added:

> "A daymark 15 feet above the surface of the water is going to be seen. A buoy 100 yards away from the wreck, a third-class buoy is not going to be seen nearly as easily as a daymark 15 feet above the water. There is no way I can say that you will see the buoy first or even at the same time or to the same degree of visibility."

The question, however, is not which type of navigational aid will best mark a hazard. To come within the reliance doctrine of *Indian Towing*, it would, at very least, have

[11] Captain Houtsma described a daymark as resembling a stop sign. While he agreed they were most common in southern waters, such as the Intracoastal Waterway, and that they would be difficult and expensive to erect if commercially done, he felt such a marker could be installed by the Coast Guard without undue difficulty at the location in question by a technique he described as "jetting a pile."

to appear that use of a wreck buoy in these circumstances was tantamount to creating a booby trap which actually worsened the position of those it was meant to help. The evidence does not begin to establish this.

There was evidence that the wreck buoy has a visual range of one mile. Dr. Baxter testified that visibility was seven or eight miles at the time of the accident. Significantly, he did not testify that he had maintained a lookout for the buoy prior to the accident. The evidence is merely that Dr. Baxter did not see the buoy, a failure which could have been due to a variety of causes, including inattentiveness. To be sure, the third class wreck buoy was the Coast Guard's smallest size, but the uncontested evidence was that, because of the shallowness of the water where the wreck was lying, the buoy could not be placed any closer to the wreck and that its size was appropriate for the depth. The buoy was visible immediately following the accident for one of the passengers from the AD LIB II swam to it. Hence we conclude that plaintiffs failed to carry their burden of establishing that the United States is liable under the principle of *Indian Towing*.

We add that the district court's finding that Dr. Baxter himself was not negligent appears to us to be clearly erroneous. We have stated that "[i]t is a primary rule of navigation that all moving vessels shall maintain a careful and efficient lookout." *Dahlmer* v. *Bay State Dredging & Contracting Co.*, 26 F.2d 603, 605 (1st Cir. 1925). The district court's finding that Dr. Baxter's wholly unexplained failure to see the wreck buoy was not the result of a failure to maintain a proper lookout rested solely on unsupported speculation that the buoy might have been concealed by rips or swells. Moreover, despite realizing



he was in a shoal area,[12] and with knowledge that the wreck was located somewhere on the shoal, Dr. Baxter operated at semi-planing speed without taking steps to ascertain that he was clear of the wreck. See notes 3, 9, *supra*. We think the evidence permits but one conclusion—that the operator was in some degree negligent.[13]

We conclude that the United States did not violate 14 U.S.C. § 86 and is not liable under the doctrine of *Indian Towing*.

Notwithstanding our conclusion that the government violate dneither *Indian Towing* nor any applicable statutory duty, we assume for the purpose of this opinion that after the government placed a hazardous obstruction—albeit a lawful one—in navigable waters, it was required to warn the public of the potential danger. But we think that once the Coast Guard, the agency with special expertise in marking the myriad obstructions to navigation, has reached a reasoned judgment[14] as to the appropriate marking and has accordingly marked, and the government has charted, the obstruction thus enabling a prudent mariner in the exercise of due care to avoid the hazard, all that is required has been done.

We therefore conclude the government was not responsible for the sinking of the AD LIB II and the subsequent injuries to plaintiffs' decedents.

*Reversed.*

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[12] Dr. Baxter testified that he saw shoal or rip water one half to three quarters of a mile ahead.

[13] We discuss Dr. Baxter's negligence to dispel the suggestion that because Dr. Baxter did not see the buoy it must have been inadequate; we do not mean to suggest that Dr. Baxter's negligence is in any sense imputed to plaintiffs' decedents.

[14] We note that the Coast Guard considered various means of dealing with the PC 1203 remains. *See Chute*, 449 F. Supp. at 177-78.

## APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 72-3412 F.

JAMES A. CHUTE, Administrator of the Estate of James L. Chute, and
Helen L. Dotteridge, Administratrix of the Estate of Harlan Lincoln Matthews,
*v.*
UNITED STATES of America.

*Joseph G. Abromovitz*, Boston, Mass., for plaintiff.
*William B. Sleigh, Jr.*, Boston, Mass., for third party defendant.
*Henry H. Hammond*, Asst. U.S. Atty., Boston, Mass., *David V. Hutchinson*, U.S. Dept. of Justice, Washington, D.C., for the United States.

### OPINION

Feb. 17, 1978.

FREEDMAN, District Judge.

The plaintiff, James A. Chute, is the son of James L. Chute and the administrator of his estate. The plaintiff, Helen L. Dotteridge, is the daughter of Harlan Lincoln Matthews and the administratrix of his estate. Both plaintiffs have brought this action to recover for the deaths of their respective fathers as a result of the sinking of the boat AD LIB II on September 30, 1971 in Nantucket Sound.[1] Both decedents had been guests on the AD LIB II, which was owned and operated by Dr. Robert L. Baxter, a friend. Plaintiffs allege the AD LIB II sunk when it struck a submerged wreck on Horseshoe Shoals in Nantucket Sound,

[1] By agreement, the present trial involved only the liability issue. Upon a finding of such liability, a subsequent trial on damages would be necessary.



approximately seven to eight miles south-southwest of Hyannis Port, Massachusetts. The plaintiffs contend that the wreck was improperly marked by the defendant, the United States. The wreck consists of a Navy ship, PC1203, which had been deliberately grounded on Horseshoe Shoals in 1949 for use as a bombing target.

### JURISDICTION

The plaintiffs brought their action under 28 U.S.C. § 1333, the Public Vessels Act, 46 U.S.C. §§ 781 *et seq.*, the Suits in Admiralty Act, 46 U.S.C. §§ 741 *et seq.*, the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.*, the general maritime law, Massachusetts common law, and the Massachusetts wrongful death act, M.G.L. c. 229, § 1 *et seq.* For the reasons stated below, the court concludes that jurisdiction in this case is properly established under 28 U.S.C. § 1333, the Suits in Admiralty Act, 46 U.S.C. §§ 741 *et seq.*, and the general maritime law.

[1, 2] The Federal Tort Claims Act expressly excludes from its coverage any claim for which the Suits in Admiralty Act 46 U.S.C. §§ 741-752, or the Public Vessels Act, 46 U.S.C. §§ 781-790, provides a remedy. 28 U.S.C. § 2680(d). While there is authority to the contrary, *J. W. Petersen Coal & Oil Co.* v. *United States*, 323 F.Supp. 1198 (N.D. Ill. 1970), the majority view and one adopted in this Circuit is that the present action arises in admiralty, and not under the Federal Tort Claims Act. *Gercey* v. *United States*, 540 F.2d 536, 537 n. 1 (1st Cir. 1976), *cert. denied*, 430 U.S. 954, 97 S.Ct. 1599, 51 L.Ed.2d 804 (1977), and cases cited therein. *See also, United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 176 n. 14, 96 S.Ct. 1319, 47 L.Ed.2d 653 (1976). Suits in admiralty are governed by federal substantive and procedural law, *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625, 628, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959).

[3, 4] As between the Suits in Admiralty Act and the Public Vessels Act, the court concludes that the former is the more appropriate basis for jurisdiction. While the PC1203 was at one time "a public vessel of the United States," 46 U.S.C. § 781, it does not automatically always remain so. Once the PC1203 was destroyed as a vessel and became merely a bombing target, it no longer possessed any attributes of a public vessel and could thus not be characterized as such. Consequently, the Public Vessels Act is inapplicable. Jurisdiction therefore properly lies under the Suits in Admiralty Act. The Suits in Admiralty Act constitutes a waiver of sovereign immunity of the United States for certain maritime claims against the federal government. *Gercey* v. *United States, supra,* 540 F.2d at 539. The scope of this waiver will be discussed subsequently when the nature of the Coast Guard's duty to mark the wreck is examined.

[5] This court also concludes that plaintiffs' action arises under the general maritime law and is not based on either the Massachusetts wrongful death act or the common law of Massachusetts. *Moragne* v. *State Marine Lines, Inc.,* 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970); *Sea-Land Services, Inc.* v. *Gaudet,* 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed.2d 9, *reh. denied* 415 U.S. 986, 94 S.Ct. 1582, 39 L.Ed.2d 883 (1974); *cf. Barbe* v. *Drummond,* 507 F.2d 794 (1st Cir. 1974).

## EVIDENTIARY RULINGS

[6] The court reserved judgment on the admissibility of several exhibits during trial. In order that it is clear which evidence the court relies upon in rendering its decision, the court makes the following evidentiary rulings. The plaintiffs had sought to introduce two letters of correspondence between Chester Crosby and Lieutenant Commander Ransom K. Boyce, then the Assistant Chief, Aids to Navigation Branch of the U.S. First Coast Guard District. Crosby was Chairman of the Waterways Committee, an advisory committee to the Board of Selectmen of the Town of Barnstable, Massachusetts, with regard to problems around the harbors and waterways. Writing to the Coast Guard in his capacity as Chairman, under date of October 4, 1971, Crosby expressed concern as to the adequacy of the marking of the wreck of the PC1203. As will be discussed in this court's Findings of Fact, the buoy set up to mark the PC1203 was not placed directly on the wreck, but at some distance from it. The letter from Crosby, Plaintiffs' Exhibit 15, refers to a previous request to have the Coast Guard attach a day beacon to the wreck and the fact that that request had been refused. It further acknowledges the problem of placing buoys close to submerged wrecks, but suggests that "since the United States Navy placed the wreck on the shoal, couldn't an eventual solution be to have them dynamite the remains of [the wreck] during the late fall after the fishing season and remove the debris. Boyce's response, dated October 13, 1971, Plaintiffs' Exhibit 16, states that the Coast Guard had decided "to blow up the remains of the wreck and wire drag the area to the depth of five feet below the reference plain," and concludes that "[i]t is felt that this is a satisfactory solution to the problem." Crosby was called by the plaintiffs as a witness at trial. The defendant argues that the correspondence is irrelevant since it occurred after the date of the accident. The plaintiffs argue the letters are admissible on the ground they demonstrate the feasibility of alternative means of protecting the boating public from the wreck remains, namely blowing up the wreck, citing Fed.Rules Evid. Rule 407, 28 U.S.C.A. I agree with the plaintiffs and therefore find the letters, Plaintiffs' Exhibits 15 and 16, admissible.

The plaintiffs also attempted to introduce a Coast Guard record of telephone contact, dated October 8, 1971, Plain-

tiffs' Exhibit 17, regarding the procedures to be taken in order to dynamite the PC1203 wreck. The record is offered for the same purpose as the letters discussed, *supra,* and for the same reasons, I conclude Plaintiffs' Exhibit 17 is also admissible.

[7] Finally, plaintiffs wish to introduce several letters of correspondence between John T. Fallon, an interested mariner in the area, and the Coast Guard. The first letter, Plaintiffs' Exhibit 18, dated October 18, 1971, and addressed to Commander Anthony Nigro of the U.S. First Coast Guard District, expresses concern with regard to the inadequacy of the Coast Guard's placement of the buoy to mark the wreck of the PC1203. Fallon suggests that either the Coast Guard blow up the wreck completely or put a buoy directly on the wreck. Plaintiffs maintain the letter is admissible to show the feasibility of blowing up the wreck remains prior to the accident involving the AD LIB II. Although the Coast Guard admits receiving the letter, Mr. Fallon was not called as a witness at trial. The letter is therefore inadmissible hearsay. Moreover, since the letter was written subsequent to the sinking of the AD LIB II, it could not have served as any type of notice to the Coast Guard prior to the accident as to the inadequacy of the government's marking of the wreck. For these reasons, the letter from Mr. Fallon, dated October 18, 1971, Plaintiffs' Exhibit 18, is not admissible.

[8] On November 4, 1971, Lieutenant Commander Ransom K. Boyce responded to Mr. Fallon's letter. This is the same officer who responded to Mr. Crosby's letter. No one disputes that this letter was written "[b]y direction" of the Commander of the First Coast Guard District. This letter, Plaintiffs' Exhibit 19, stated in relevant part:

> In reply to your letter of 18 October 1971 concerning the unfortunate sinking of the AD LIB II with the attendant loss of life on Horseshoe Shoals, the U.S. Coast Guard has presently contracted to have the remains of this wreck removed and wire dragged to a depth of five feet above the reference plane. It is felt that this solution will prevent another unfortunate occurrence. . . . your suggestion to buoy directly above the wreck, although desirable, is not practical and had not been done in the past.



The plaintiffs assert this letter is admissible primarily on two theories. First, that it also demonstrates the feasibility of blowing up the wreck as a precautionary measure to prevent boats from colliding with the wreck. Second, the plaintiffs contend the letter is admissible as an admission by the government that the AD LIB II sank because it hit the wreck and not the shoals. Plaintiffs argue that the inference necessary to find that this letter is such an admission can be drawn from the first part of the letter, as quoted above, since it would not otherwise make sense for the Coast Guard to combine in the same sentence references to both the AD LIB II's sinking and the government's decision to blow up the PC1203 wreck. That such an inference can be drawn is further supported by the next sentence in the letter to the effect that demolishing the wreck "will prevent *another* unfortunate occurrence." (Emphasis added.) The court agrees that the letter from Lieutenant Commander Boyce to Mr. Fallon, Plaintiffs' Exhibit 19, is admissible because it is probative on the issue of the feasibility of alternative measures to protect the boating public from the wreck—namely demolition of the wreck—prior to the sinking of the AD LIB II; Fed.RulesEvid. Rule 407, 28 U.S.C.A., and because, by inference, it can be viewed as an admission by the Coast Guard that the AD LIB II sank because it hit the wreck.

The plaintiffs also seek to admit the letter from Mr. Fallon, dated November 5, 1971, in response to the November 4, 1971 letter of Lieutenant Commander Boyce. The court

concludes that this letter, Plaintiffs' Exhibit 20, is hearsay and is not probative on the issues involved in this case. Therefore, it is not admissible.

## FINDINGS OF FACT

### I. Marking the PC1203 Wreck.

The PC1203 allegedly hit by the AD LIB II was a former Navy patrol craft. At all times material to this case, little, if any, of the remains of the PC1203 wreck was above the water's surface except at low tide when small portions of the vessel broke the water's surface. The depth of the water in the vicinity of the wreck varies according to the tides from approximately 2 feet to 4.8 feet. See Tr. Vol. 2 at 18 (Dec. 16, 1976) and Tr. Vol. 1 at 71 (Dec. 17, 1976).

From 1949 to 1961, the area where the PC1203 was grounded was designated as a danger area. In 1961, the danger designation of the area was removed. During this period, the PC1203's location was unmarked except for a pipe affixed to it by persons unknown. This pipe, however, was destroyed during a hurricane in the mid-1950's.

In July, 1963, as a result of requests from local maritime interests, a can buoy with a visual range of one and a quarter miles was established 275 yards, 270° True (west) from the wreck. This buoy was black and red with a reflector, but had no light or gong. It was designed for a semiexposed area, having a water depth of 15 to 540 feet. The draft of the buoy was 6 feet 8 inches. The height of the buoy above water was 6 feet 10 inches. It had a 5000-pound sinker to moor it.

A memorandum dated October 22, 1965 to the Coast Guard Commandant from the Commander, First Guard District, and signed by Captain C. G. Houtsma[2] "by direc-

[2] This is the same Captain Houtsma called by the plaintiffs as an expert. See p. 184, *infra*, and n. 15, *infra*.



tion" of the Commander, discussed the adequacy of this buoy marking and concluded that the position and type of buoy was adequate to mark the wreck of the PC1203. It noted that

> 3. . . . For the imprudent or uninitiated boatman, or the pleasure fisherman who is trolling or drifting aimlessly, the only satisfactory position of the buoy would be directly over the wreck, which is impractical. As a convenience for the fisherman, it may be possible to relocate the buoy closer to the wreck after a survey of the area by a shallow draft boat; but such a relocation would impose additional restrictions and risks to the servicing tender, which, in this situation, is considered unwarranted.

The memorandum, however, then went on to state:

> 4. Since making no change is unlikely to satisfy the complainants in this matter, it appears that there are several alternatives possible to alleviate the problem:
>
> a. Obtain congressional support in asking the Navy to remove the wreck, or have the Navy reimburse the Corps of Engineers for its removal.
>
> b. Obtain a specific authorization from Congress for the Coast Guard to pay for the removal of the wreck.
>
> c. Obtain permission from the Corps of Engineers to place sufficient riprap at the location of the wreck to insure a visible object at all stages of the tide.
>
> d. Erect a daybeacon structure immediately adjacent to the wreck.

The memorandum stated that

> 5. The relative economics of b., c., and d. would require further study. Operationally, the daybeacon would be preferable to the riprap; but construction

costs of a structure capable of withstanding the wind and sea action in this locality *may be* relatively expensive. [Emphasis added.]

On October 25, 1965, a new position was established for the buoy at 100 yards, 315° True from the wreck remains as a result of the request of Congressman Hastings Keith that the Coast Guard reevaluate the position of the buoy relative to the remains of the wreck.

On August 30, 1969, the buoy marking the wreck was replaced by a smaller buoy[3] with a visual range of one mile. This buoy was designed to be used in a sheltered area, with a minimum water depth of 10 feet, and a maximum of 200 feet. It had a draft of 4 feet 9 inches, a height of 3 feet 6 inches, and required a 3000-pound sinker to moor it. The depth of the water at this location is 15 feet. At the time of the accident, the buoy was on station.

On October 24, 1969, Mr. Crosby, writing as Chairman of the Waterways Committee, requested the Coast Guard "to install a day mark or some suitable structure to mark the wreck" since "[e]ven though a buoy marks the location, it is so far away that no one realizes just where the wreck is."

In a letter dated November 7, 1969, the Chief of the Aids to Navigation Branch for the First U.S. Coast Guard District, Captain R. J. Dahlby, by order of the Commander, denied the request for a daymark, noting that "[a]lthough a fixed daymark would better mark the wreck,

[3] Captain Thompson of the United States Coast Guard testified as to the description of the buoys and their location. As of September, 1971, he was the Chief of Aids to Navigation, First District Office of the U.S. Coast Guard, stationed in Boston. He stated that the Coast Guard continually reviews the size of the aids to navigation "with the idea that we use the smallest aid possible to mark an area. This is because of the danger inherent in handling heavy weights that we would use as light a weight buoy as we could." Tr. Vol. 1 at 37-38 (Dec. 17, 1976).



it would be prohibitively expensive and of questionable value." This letter also referred to the area in question as "inherently dangerous."

## II. The Accident.

Between 7:00 a.m. and 8:00 a.m. on September 30, 1971, Dr. Robert L. Baxter (aged 69); his wife; John Ohrn (aged 34); and the decedents, Dr. James L. Chute (aged 75) and Harlan L. Matthews (aged 77), departed from Lewis Bay on the AD LIB II and proceeded to Nantucket Sound to fish. The AD LIB II had a length of 24 feet, a width of approximately 10 feet, a mean draft of 3 feet, and a fiberglass hull. Dr. Baxter was an experienced mariner in the Nantucket Sound area, having fished in the area for some 40 years. He had also taught local courses in navigation and therefore knew that a wreck buoy is not placed on top of a wreck.

At approximately noon, the boating party decided to head toward home. The weather was "hazy; not foggy." Tr. Vol. 1 at 4 (Dec. 17, 1976). The vessel was in the vicinity of Horseshoe Shoals somewhat south of the location of the wreck.[4] Dr. Baxter was at the helm and headed the vessel in a north-northeast course on a heading of 30° magnetic at a speed of 14 knots. At this speed the boat was semi-planing. Dr. Baxter observed the tower on the hill at Hyannis Port and decided that his course would take him back to Hyannis. Shortly after choosing his course, Dr. Baxter expressed surprise at the shallow depth of the water. Moments later, a sound was heard indicating the vessel had struck something. One of the party went below to check the hull and discovered a break in the fiberglass skin on the starboard side which was then stuffed with rags.

[4] The AD LIB II's location at this time was determined on the basis of Dr. Baxter's navigational experience and familiarity with the movement of the waters in the area. Tr. Vol. 1 at 6 (Dec. 17, 1976).

No one on the AD LIB II saw precisely what the boat struck. The plaintiffs claim the boat hit the wreck of the PC1203 which could not be seen since it was under the water. The defendant contends that the AD LIB II did not hit the wreck, but hit Horseshoe Shoals themselves. After careful consideration of all the evidence presented at trial, the court finds that the AD LIB II sunk as a result of hitting the wreck, and not the shoals.

The court first points to the admission to this effect contained in the letter of November 4, 1971 from Lieutenant Commander Boyce to Mr. Fallon which has already been discussed, *supra,* in this court's Evidentiary Rulings. As additional support for their claim regarding causation, plaintiffs offered evidence on the nature of the sea bottom in the area of the accident as indicated on the navigational chart possessed by Dr. Baxter and placed into evidence by the defendant, as well as the nature of the damage to the hull of the AD LIB II. The designation on the chart which is closest to the location of the accident is *"hrd"* which, according to the chart's key, indicates "hard", and according to plaintiffs' argument, hard sand. This is distinguishable from the designation somewhat northwest of the accident area which is "rcky", meaning rocky bottom. While the plaintiffs' witness, Captain Hall, a retired professional yacht captain who was very familiar with Nantucket Sound, testified that the accident area did have some rocks and stones,[5] he testified that he had occasion to observe the hull of a fiberglass vessel that had struck a shoal comprised of hard sand (Tr. Vol. 2 at 20, Dec. 16, 1976), and that

[5] In response to questioning by plaintiffs' counsel, Captain Hall stated:

> For the most part, Horseshoe Shoals, as I think you can read from the chart, is composed of sand. However, there are areas of gravel. There are areas of stone. I know of no large rocks above the surface, but there certainly are stones three times as big as your head [on the bottom and underwater].



such an impact would not ordinarily leave "deep gouge marks that penetrate the surface through into the interior of the vessel."[6] Tr. Vol. 2 at 20 (Dec. 16, 1976). Moreover, if the boat actually hit rocks, he would "expect them to severely bruise a large area of the hull," although this would not necessarily open up the hull since "[i]t [presumably the rock] might just bounce off it [presumably the hull].[7]

Yet the evidence submitted with regard to the type of damage to the AD LIB II's hull demonstrated that the port[8] side had a tremendous gash in it. Tr. Vol. 1 at 18 (Dec. 17, 1976). Additionally, the defendant's own witness, Commander Nigro, the Coast Guard officer who investigated the sinking of the AD LIB II, conceded in his testimony that the AD LIB II probably hit the wreck. Tr. Vol. 2 at 31-32 (Dec. 16, 1976).[9]

[6] The quoted words are those of plaintiffs' counsel in questioning Captain Hall.

[7] The phrase "[i]t might just bounce off it" was that expressed by the government's counsel in questioning Captain Hall.

[8] Dr. Baxter's testimony was somewhat confusing as to whether the gash was on the port or starboard side. In his earlier testimony, Dr. Baxter had stated that immediately after impact he observed "a break in the fiberglass skin on the starboard side" and no damage to the port side. Tr. Vol. 1 at 8 (Dec. 17, 1976). See p. 179, *supra.*

[9] The defendant notes that the state boating accident report admittedly signed by Dr. Baxter states that the cause of the accident was unknown. However, the report does state, in describing what occurred, that the AD LIB II "collided with the wreck—located on southern end of Horseshoe Shoal." Presumably, this refers to the PC1203 wreck. The report also indicates that the weather at the time of the accident was clear, contrary to Dr. Baxter's testimony that it was hazy. The report was filled out by a Mr. McSorley, the State Boating Inspector for the Commonwealth of Massachusetts. In view of the evidence discussed above, and despite this report, the court concludes that the plaintiffs have met their burden in showing that the AD LIB II sank as a result of striking the PC1203 wreck.

After the AD LIB II struck the wreck, the decision was made to "try to make it" back to shore. However, the boat was taking on a lot of water and subsequently Dr. Baxter turned the AD LIB II toward the shoal, hoping to be in shallow waters. While in the turn, however, the boat sank and the parties were forced into the water.

To stay afloat, all persons put on life jackets. Additionally, Dr. Baxter had constructed an ice chest which was capable of floating. A rope was tied to the ice chest and then to each of the passengers except Mr. Ohrn who decided to try to swim to the wreck buoy, some two to three hundred yards away from where the AD LIB II sank. Dr. Baxter was closest to the ice chest; Mrs. Baxter was next; Mr. Matthews next to her; and then Dr. Chute. Some time later, Mr. Matthews swallowed some water and regurgitated, and shortly thereafter the others heard him "snoring." Dr. Chute checked Mr. Matthews' pulse and found he had none. The cause of death subsequently stated on the death certificate was drowning.

At approximately 4:30 p.m., after drifting for some four hours, the group, including Mr. Matthews, was picked up by the C/C JOHNNY B IV. The owner of that boat called the Coast Guard which dispatched its own boat, the POINT TURNER, and a helicopter. The group was then taken aboard the Coast Guard vessel. Dr. Chute was considered injured and the helicopter was to airlift him to a hospital. However, Dr. Chute was reluctant to go and the captain of the POINT TURNER did not force him to go. Dr. Chute was taken ashore by the POINT TURNER where he was met by an ambulance which drove him to Falmouth Hospital. He died the next morning at the hospital—cause of death, according to the death certificate, being "coronary insufficiency following immersion and exhaustion after boat accident at sea."



Subsequent to the accident, in October, 1971, the Coast Guard received a letter from Mr. Crosby requesting the dynamiting of the PC1203 remains. In letters dated October 13, 1971 and November 4, 1971, the Coast Guard informed Mr. Crosby and Mr. Fallon that the Coast Guard had decided to have the PC1203 remains blown up. These letters have already been discussed in the court's Evidentiary Rulings, *supra*. The wreck was accordingly demolished. The Coast Guard had not made any feasibility studies to determine the cost of dynamiting the wreck prior to September 30, 1971, the date the AD LIB II sank.

## CONCLUSIONS OF LAW

[9, 10] The Suits in Admiralty Act constitutes a waiver of the sovereign immunity of the United States for certain maritime claims against the federal government. *Gercey* v. *United States, supra,* 540 F.2d at 539. Although the Suits in Admiralty Act does not contain an express exception for harm resulting from the exercise of "discretionary functions" as does the Federal Tort Claims Act, 28 U.S.C. § 2680(a), such a limitation on the waiver of sovereign immunity must be implied. *Id.* The First Circuit has defined the "discretionary functions" exception as

> a category which includes, and probably should be limited to, basic "policy judgments as to the public interest." *See Griffin* v. *United States,* 500 F.2d 1059, 1064 (3rd Cir. 1974); K. Davis, Administrative Law Treatise § 25.08 (1976 Supp.).

*Id.* However, even assuming that the duty to mark the wreck of the PC1203 was within the discretion of the Coast Guard, the government may be liable since "there is liability for negligence in marking after the discretion has been exercised and the decision to mark had been made." *Somerset Seafood Co.* v. *United States,* 193 F.2d 631, 635

(4th Cir. 1951).[10] *Greer* v. *United States,* 505 F.2d 90, 92 (5th Cir. 1974); *see also, United Air Lines, Inc.* v. *Weiner,* 335 F.2d 379, 393 (9th Cir.), *cert. dismissed sub nom., United Air Lines, Inc.* v. *United States,* 379 U.S. 951, 85 S.Ct. 452, 13 L.Ed.2d 549 (1964).

In *Indian Towing Co.* v. *United States,* 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), the Supreme Court held the government liable under the Federal Tort Claims Act for the negligent maintenance of a lighthouse which resulted in damages when a tug towing a barge went aground. The precise issue confronted by the Court was the propriety of a governmental-non-governmental function distinction as a basis for liability under the Federal Tort Claims Act. The government had conceded that the discretionary function exception of that statute was not therein involved. Nevertheless, the Court's language is instructive. The Court stated at page 69, 76 S.Ct. at page 126 that

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.

[10] This was an alternate holding by the court. The court first concluded that the duty of the United States to mark or remove the wreck is mandatory under the Wrecks Act. "The appropriate federal agencies and officers decide merely the proper methods or measures." 193 F.2d at 635.



In *United States* v. *Sandra & Dennis Fishing Corp.,* 372 F.2d 189 (1st Cir.), cert. denied 389 U.S. 836, 88 S.Ct. 48, 19 L.Ed.2d 98 (1967), a case involving an unsuccessful Coast Guard rescue and tow operation, the court discussed the extent of the obligation which the Coast Guard owed to the claimants under 46 U.S.C. §§ 741-752, 781-790 and the principles of *Indian Towing.*

> The case of *Indian Towing, Inc.* v. *United States,* 1955, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48, upon which claimants place principal reliance, did not impose liability upon the government because the Coast Guard maintained insufficient equipment—there were navigational aids—per se, but because it failed to maintain a particular aid after the plaintiff had been led to believe it could rely on it. How much equipment the Coast Guard is to possess, and how much money it is to spend, measured, necessarily, by Congressional appropriations, must be for the government's uncontrolled discretion. We can recognize no obligation upon the government either to have . . . [a particular vessel] available, or to have had on board any particular equipment. [Citations omitted.]
>
> * * * * *
>
> What we do recognize is precisely in accord with the principle laid down in *Indian Towing,* namely, that the government must not mislead, and must not induce reliance upon a belief that it is providing something which, in fact, it is not providing. . . . By its silence when it accepted the mission it must be found that the Coast Guard led . . . [the claimants] to believe that the . . . [rescuing Coast Guard vessel] was reasonably capable of performing the task. . . . or, to put it another way, the silence was an undertaking that . . . [the Coast Guard] would perform its functions with reasonable care.

*Id.* at 195.

The plaintiffs argue that the manner in which the Coast Guard marked the wreck of the PC1203 misled the AD LIB II as to the wreck's location which caused the yacht to collide with the wreck and sink with the attendant loss of life. The plaintiffs maintain that the Coast Guard, having chosen to warn mariners of the danger posed by the wreck of the PC1203 by the erection of a buoy, had an obligation either to more adequately mark the wreck's location by means of a fixed daymark placed closer to the actual wreck or to remove the wreck entirely.

The government disclaims liability for the following reasons. First, it asserts that the AD LIB II struck the shoals and not the wreck of the PC1203. The court has already disposed of this argument in its factual findings, *supra*. Second, even if the AD LIB II sank as a result of striking the PC1203 wreck, the government maintains that such a collision was the result of the negligence of Dr. Baxter or other persons for which the government is not responsible. These "other persons" have never been identified. Finally, the government argues that the manner chosen by the Coast Guard to mark the wreck was within the discretionary function exception to the waiver of sovereign immunity, that the manner so chosen did not mislead anyone, including Dr. Baxter, and that in view of the funding and equipment available to the Coast Guard, the buoy actually erected was the most appropriate navigational aid employable under the circumstances. After reviewing the evidence and analyzing the applicable authorities, this court concludes that the government is liable for the sinking of the AD LIB II and the deaths of Mr. Matthews and Dr. Chute.

[11, 12] The court rejects the defendant's contention that Dr. Baxter's negligence was the cause of the sinking



of the AD LIB II.[11] The government argues that Dr. Baxter failed to keep a proper lookout and that in view of the location of the boat at the time of the accident, he operated the AD LIB II in a negligent manner, including proceeding at an excessive speed. I agree with the government that Dr. Baxter had a duty to "maintain a careful and efficient lookout." *Dahlmer* v. *Bay State Dredging & Contracting Co.*, 26 F.2d 603, 605 (1st Cir. 1928); *Harris* v. *Newman*, 404 F.Supp. 947, 951 (S.D. Miss. 1975), 33 U.S.C. § 221. However, the evidence does not support the conclusion that such a lookout was not maintained. The fact that Dr. Baxter was an experienced navigator in the vicinity of Horseshoe Shoals and familiar with the principle that wreck buoys are not placed directly on top of wrecks, does not necessarily mean that Dr. Baxter should have seen the wreck buoy and therefore should have known precisely where the remains of the PC1203 were located. This is not the kind of situation where Dr. Baxter's admitted failure to see the wreck buoy constitutes negligence on his part. *Jett* v. *Texas Co.*, 73 F.Supp. 699, 706 (D. Del. 1947); *Sun Oil Co.* v. *SS Georgel*, 245 F.Supp. 537, 545 (S.D.N.Y. 1965), *aff'd* 369 F.2d 406 (2nd Cir. 1966). The accident area was one that was subject to rips or swells which could easily have concealed a buoy which was only some three and one-half feet above the water's surface. Dr. Baxter testified[12] that he did not see the buoy and, had he seen it, he would have altered his course. Tr. Vol. 1 at 23 (Dec. 17, 1976). Dr. Baxter was thus forced to rely to his detriment upon the absence of the wreck buoy, "the one 'landmark' which would not only pinpoint his location

[11] The court similarly rejects the government's contention that persons other than Dr. Baxter are liable for the sinking of the AD LIB II, since the government has failed to even identify who such persons might be.

[12] In view of Dr. Baxter's age, the parties agreed that he would testify by deposition.

but also pinpoint the one known hazard in the area." Plaintiffs' Reply Brief at 18. In view of this situation, the court cannot conclude that Dr. Baxter's failure to see the buoy was the result of his failure to maintain a proper lookout.

The government points to the fact that the AD LIB II was semi-planing at the time of the accident and traveling at a rate of 14 knots. It contends that proceeding in such a fashion was negligent in view of Dr. Baxter's knowledge of the existence of the shoals and the wreck buoy somewhere in the area. This evidence alone, however, is insufficient to support the conclusion that the vessel's speed was excessive or that Dr. Baxter was otherwise operating the AD LIB II negligently.

The government also presented evidence that, as a result of feeling ill the night before the fatal accident, Dr. Baxter had lost sleep. It thus argues that his alertness the next day was diminished. This court is not persuaded, however, that there is any causal connection between Dr. Baxter's health condition the previous night and the accident. No evidence was submitted indicating that prior to the accident Dr. Baxter had any difficulty or showed any signs of inattentiveness.

Unlike several of the cases cited by the defendant, the AD LIB II was adequately equipped, *McMilin* v. *United States,* 290 F.Supp. 351 (D. Del. 1968), and Dr. Baxter did not knowingly proceed into a danger area where he had actually observed buoys warning of danger. *Brewer* v. *E. J. Platt Fisheries, Inc.,* 511 F.2d 182 (5th Cir. 1975).

[13] Both parties acknowledge that the wreck was not located in a marked navigational channel. Plaintiffs contend, however, that the area was one frequented by pleasure boats and fishermen[13] and that the government had actual

[13] There could be approximately 60 to 100 such boats in the area per day from 1963 to 1971.



knowledge of such usage. Additionally, plaintiffs argue that "navigable channels" as used in the statute "has not been construed to confine the Act [33 U.S.C. § 409] to the dredged, buoy marked channels to which commercial vessels are largely confined." *Lane* v. *United States,* 529 F.2d 175, 179 (4th Cir. 1975). This court, however, need not resolve the extent to which the Coast Guard was obligated to mark a wreck located on Horseshoe Shoals since the Coast Guard itself already made that decision. Having once decided to mark the PC1203, it had to do so reasonably, whether or not the PC1203 was located in a "navigable channel."

The plaintiffs condede that the wreck buoy involved in the present case was on station and could not have been located closer to the PC1203 remains. They argue, however, that the wreck of the PC1203 could not and was not adequately marked by a buoy. They assert that in order to properly warn mariners of the danger posed by the wreck, the Coast Guard should have either installed a daymark, which could have been erected closer to the wreck than the buoy, or completely demolished the PC1203 remains.

[14] The Coast Guard argues that the method chosen to mark the PC1203 wreck was wholly within the discretion of the Coast Guard and thus the government is not liable for any inadequacies in the method so chosen. The government notes that the statute governing the marking of wrecks only requires that such marking be done by a "buoy *or* beacon." 33 U.S.C. § 409 (emphasis added). The Coast Guard maintains that it was therefore within the government's discretion to choose whether to mark the PC1203 wreck with a buoy or a beacon. The court disagrees with this interpretation of the statutory language. The mere fact that such language allows a wreck to be marked with a "buoy or beacon" does not give the Coast Guard free rein to choose the method which is merely more convenient

or less expensive. Rather, the more reasonable interpretation of this language is that the method used should be the one most appropriate under the circumstances of a particular case. It is therefore necessary to examine the circumstances surrounding the case at bar.

The Coast Guard, in its answer of October 28, 1965 to Congressman Keith's inquiry regarding the buoy's location, stated "[i]deally the buoy should be directly over the wreck, but this is not possible because of the danger to servicing vessel." This point is apparently not disputed by the parties. As to the erection of a beacon or daymark, the Coast Guard correspondence with Mr. Crosby dated November 7, 1969 indicates it considered the cost prohibitive. This sentiment was reiterated by Captain Thompson of the Coast Guard, see note 3, *supra,* who testified at trial by way of deposition that "a [fixed] marker in this particular area is not cost-effective." Tr. Vol. 7 at 41 and Vol. 2 at 36-37 (Dec. 17, 1976).[14] Arguing that the Coast Guard could not be required to make such an unwarranted expenditure, the government maintains that the availability of the funds and equipment necessary to erect a daymark "must be for the government's uncontrolled discretion," citing *United States* v. *Sandra & Dennis Fishing Corp., supra,* 372 F.2d at 195.

Plaintiffs' expert, Captain C. G. Houtsma,[15] disagreed

[14] Captain Thompson identified the following factors as those which he would consider in determining the suitable method of marking the wreck: depth of the water over the wreck, location of the wreck, location of other aids in the vicinity, normal routes of navigation in the area, and the geographical conditions. Tr. Vol. 1 at 34-35 (Dec. 17, 1976).

[15] Captain Houtsma retired from the Coast Guard after some 29 years of service. He holds a degree in naval engineering from Massachusetts Institute of Technology. He has had considerable experience in the Aids to Navigation Section of the Coast Guard, particularly with regard to the inner coastal waterway. As a result of his duties, he has spent time on buoy tenders and observing them



with the government's evaluation of the feasibility of erecting a daymark and asserted that a daymark could be established immediately adjacent to the PC1203 wreck by a process which he described in detail known as "jetting a pile." Additionally, the daymark is generally about 15 feet high (above the water), whereas, as already noted, the buoy placed by the Coast Guard was only some three and one-half feet high (above the water). Tr. Vol. 1 at 87 (Dec. 17, 1976). Through extensive testimony, Captain Houtsma explained that the erection of a daymark, while concededly prohibitively expensive if done commercially by a private nongovernment contractor, Tr. Vol. 1 at 92 (Dec. 17, 1976), could be done manageably by the use of standard Coast Guard equipment which was readily available during the period in question and with approximately half the number of men required to service a buoy. Tr. Vol. 1 at 79, 81 (Dec. 17, 1976). The Coast Guard admitted that at the time of the accident it had a vessel available, a 45-foot flat bottom vessel with a draft of three feet, which Captain Houtsma believed could adequately perform the "jetting" procedure. Tr. Vol. 1 at 72-73 (Dec. 17, 1976).

The government attempted to discredit Captain Houtsma's opinion by introducing the memorandum to the Coast Guard Commandant, dated October 22, 1965, which was signed by Captain Houtsma while he was actually in the Coast Guard. See p. 176, *supra.* While, at first glance, this memorandum raises some question as to the validity of Captain Houtsma's opinion concerning the feasibility of erecting a daymark, the memorandum does not preclude the conclusion which Captain Houtsma expressed at trial. Captain Houtsma insisted the memorandum merely raised the importance of exploring alternatives to the buoy marking

function and has had experience in pile driving and jetting piles and the construction of daymarks. Captain Houtsma was familiar with Nantucket Sound. While assigned to the Boston Coast Guard office, he served as Operation Officer and as Chief of Staff.

then in existence and that his opinion stated at trial was therefore not inconsistent with that expressed in the memorandum. Unfortunately, the need to explore those alternatives was ignored. The memorandum was only a tentative analysis. The fifth paragraph specifically calls for "further study" of the alternatives. The memorandum does not rule out the erection of a day beacon as being prohibitively expensive since it merely states that such an endeavor *may* be *relatively* expensive. Additionally, the court notes that despite the apparent satisfaction with the buoy's location which is expressed in the memorandum, the buoy was in fact moved closer to the wreck within days of the date of that document. This lends support to the contention that the memorandum's analysis was somewhat tentative and that it called for the exploration of alternatives before any final decision was rendered. I find Captain Houtsma's testimony at trial persuasive and conclude that the PC1203 wreck could and should have been marked by a daymark rather than a buoy in order to more adequately safeguard the boating public.

[15] However, even if this court were to conclude that the erection of a daymark by the jetting process was not feasible or cost-effective as the Coast Guard maintains, I would still find the Coast Guard liable for negligence in marking the PC1203 wreck by means of a buoy located 100 yards away. This is because the Coast Guard could and should have completely demolished the PC1203 remains in order to properly carry out the duty it had undertaken to protect mariners from the hazard posed by the wreck. That such demolition was feasible is demonstrated by the fact that it was actually done subsequent to the accident. Nothing presented to this court indicates that circumstances were any different before the accident than after it so as to have prevented the earlier demolition. Moreover, the evidence showed that the Coast Guard did



not even inquire as to the feasibility of blowing up the PC1203 remains prior to the sinking of the AD LIB II.

Finally, this court wishes to comment on the defendant's reliance on the First Circuit's decision in *Gercey* v. *United States, supra.* Such reliance is misplaced. *Gercey* involved a wrongful death action brought under the Suits in Admiralty Act and based on the drowning of the plaintiffs' son when a private vessel broke apart and sank. In *Gercey,* the government had revoked the certification of the vessel without which the vessel could not lawfully carry six or more persons for hire as it had done. The plaintiffs argued that the Coast Guard had "a statutory or common law duty to take reasonable steps to protect the fee paying public from vessels which the Coast Guard has refused to certify and which it knows to be unsafe." *Id.* at 537. In *Gercey,* the question involved was whether the government had an obligation to undertake a particular task, namely notifying the public of its certification decision. In contrast, in the present case, the government has already chosen to undertake a particular task—warning mariners of the location of a dangerous obstacle to navigation. The complaint of the plaintiffs at bar is founded on the method or manner chosen to carry out that decision.[16]

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[16] In *Gercey,* the First Circuit stated:

> [T]he Coast Guard's alleged negligence lies in failing to adopt a policy of taking positive steps to protect the public from vessels whose certificates have been revoked, not in imperfectly executing a federal program established either by an act of Congress or a federal regulation. *Compare Indian Towing Co.* v. *United States,* 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), *and Coastwise Packet Co.* v. *United States,* 398 F.2d 77 (1st Cir. 1968). . . . Although we agree with plaintiffs that the Coast Guard has discretionary authority to adopt such a follow-up program, *it has not done so.* [Emphasis added.]
>
> The decision whether to institute such a policy, in our view, involves a basic policy judgment as to how the public interest may best be promoted.

540 F.2d at 538.

[16] In summary, this court finds the defendant, the United States, liable for the sinking of the AD LIB II and the deaths of Mr. Matthews and Dr. Chute because of defendant's negligent marking of the remains of the PC1203. "That more precise marking was required is clear in the light of the intentional sinking of the ship [the PC1203] and the reduction of its visible parts." *Thompson v. United States*, 266 F.2d 852, 854 (4th Cir. 1959). Once the Coast Guard chose to exercise its discretion to warn mariners of the danger posed by the wreck, it had an obligation to do so properly. Placing a buoy only rising some three and one-half feet above waters known to be subject to swells and positioned approximately 100 yards away from the actual wreck did not satisfy this obligation. The Coast Guard should have either erected a daymark rising some 15 feet above the water immediately adjacent to the wreck or demolished the PC1203 remains completely. Having failed to do either, the government must be held liable for the sinking of the AD LIB II and the tragic deaths of two of its passengers.[17]

[17] Additionally, because the court concludes that the plaintiffs have proven their case, the defendant's motion for judgment in its favor, made at the close of plaintiffs' case, is denied. The court suggests that the parties take the next sixty (60) days to decide whether there is any opportunity to settle this case on the issue of damages. Failure to do so will result in the court's marking the case for a hearing on damages.



## APPENDIX C

**14 U.S.C., §86. Marking of obstructions**

The Secretary may mark for the protection of navigation any sunken vessel or other obstruction existing in the navigable waters or waters above the continental shelf of the United States in such manner and for so long as, in his judgment, the needs of maritime navigation require. The owner of such an obstruction shall be liable to the United States for the cost of such marking until such time as the obstruction is removed or its abandonment legally established or until such earlier time as the Secretary may determine. All moneys received by the United States from the owners of obstructions, in accordance with this section, shall be covered into the Treasury of the United States as miscellaneous receipts. This section shall not be construed so as to relieve the owner of any such obstruction from the duty and responsibility suitably to mark the same and remove it as required by law.

As amended Sept. 17, 1965, Pub.L. 89-191, 79 Stat. 822; May 14, 1974, Pub.L. 93-283, § 1(3), 88 Stat. 139.

**33 U.S.C., § 409 Obstruction of navigable waters by vessels; floating timber; marking and removal of sunken vessels**

It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft; or to voluntarily or carelessly sink, or permit or cause to be sunk, vessels or other craft in navigable channels; or to float loose timber and logs, or to float what is known as "sack rafts of timber and logs" in streams or channels actually navigated by steamboats in such manner as to obstruct, impede, or endanger navigation. And whenever a vessel, raft, or other craft is wrecked and sunk in a navigable

channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently, and failure to do so shall be considered as an abandonment of such craft, and subject the same to removal by the United States as provided for in sections 411 to 416, 418, and 502 of this title.

Mar. 3, 1899, c. 425, § 15, 30 Stat. 1152.

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No. 79-1311

# In the Supreme Court of the United States

OCTOBER TERM, 1979

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JAMES A. CHUTE, ADMINISTRATOR OF THE ESTATE OF JAMES L. CHUTE, ET AL., PETITIONERS

*v.*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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WADE H. MCCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

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Petitioners contend that the United States is liable in damages for failing adequately to mark or remove the remains of an abandoned bombing target that was struck by the boat in which petitioners' decedents were passengers.

1. The facts, as summarized by the court of appeals (Pet. App. 12-14), are not in dispute. On September 30, 1971, petitioners' decedents were passengers in a boat owned and operated by Dr. Robert Baxter. While the boat was returning to Hyannisport, Massachusetts, from Nantucket Sound, it sank after striking the remains of a Navy patrol craft that in 1949 had been deliberately

grounded by the government for use as a bombing target. In 1961 the Navy ceased bombing practice in the area and removed restrictions on public access, but it did not remove the remains of the wreck, which were not visible above water. Several years after the Navy discontinued its use of the wreck, the Coast Guard marked it with a buoy.

At the time of the accident, the wreck was marked by a red and black buoy that projected three feet six inches above the water and was located 100 yards from the wreck. The navigational chart of the area accurately depicted the locations of the wreck and the buoy. The buoy was on station at its charter position when the accident occurred, but Dr. Baxter testified that he did not see the buoy prior to striking the wreck.

The district court found the United States liable for the accident and ensuing deaths (Pet. App. 28-52; 449 F. Supp. 172). The court held that "[o]nce the Coast Guard chose to exercise its discretion to warn mariners of the danger posed by the wreck, it had an obligation to do so properly" (Pet. App. 52), and that the failure adequately to mark the wreck or to demolish its remains did not satisfy that obligation (*ibid.*).

The court of appeals reversed (Pet. App. 11-27; 610 F. 2d 7). The court first concluded that the provisions of 33 U.S.C. 409 requiring the marking and removal of an unlawful obstruction that has been sunk in a navigable channel are not applicable to an obstruction that the government has placed for a proper purpose (Pet. App. 16). It then rejected petitioners' argument that under 14



U.S.C. 86[1] the government's discretion "in deciding whether or not, and how, to mark an obstruction * * * is subject to a judicially enforceable obligation to exercise [that discretion] 'responsibly' " (Pet. App. 18). The court assumed that "after the government [has] placed a hazardous obstruction * * * in navigable waters, it [is] required to warn the public of the potential danger" (*id.* at 27). However, the court concluded that "once the Coast Guard, the agency with special expertise in marking the myriad obstructions to navigation, has reached a reasoned judgment as to the appropriate marking and has accordingly marked, and the government has charted, the obstruction thus enabling a prudent mariner in the exercise of due care to avoid the hazard, all that is required has been done" (*ibid.*; footnote omitted).

2. Petitioners contend (Pet. 5-7) that the court of appeals' decision concerning the proper scope of 14 U.S.C. 86 conflicts with the decision of the Fourth Circuit in *Lane* v. *United States*, 529 F. 2d 175 (1975), and that review by this Court is warranted to resolve that conflict. We disagree.

*Lane* involved a suit in admiralty arising out of the collision of a boat with an unmarked sunken barge. The Fourth Circuit concluded that Section 86 does not impose upon the Secretary of Transportation a mandatory duty to mark every unremoved wreck in navigable waters. 529 F. 2d at 178. The court added, however, that in exercising

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[1] 14 U.S.C. 86 provides in pertinent part:

> The Secretary [of Transportation] may mark for the protection of navigation any sunken vessel or other obstruction existing on the navigable waters or waters above the continental shelf of the United States in such manner and for so long as, in his judgment, the needs of maritime navigation require [redacted] * * *.

his discretion the Secretary is not free "to ignore submerged wrecks of which he is informed, or fail to mark them if they constitute real dangers to navigation." *Id.* at 179. The court accordingly remanded the case for a determination whether the failure to mark the sunken barge was an abuse of the Secretary's discretionary authority to mark sunken wrecks under Section 86. 529 F. 2d at 180.

In contrast to *Lane*, this case does not concern the failure to mark a wreck, since there is no dispute that the remains of the former bombing target had been marked, that the positions of the buoy and the wreck were accurately depicted on the chart, and that the buoy was on station at the time of the accident. Instead, this case presents the different question—not decided in *Lane*—whether, once it has decided to mark a wreck, the government is liable under Section 86 for failing to select "the most effective and best means" to achieve that purpose (Pet. App. 22). As the court of appeals correctly concluded (*id.* at 19), "[t]he statute affords no basis for inferring a grant of judicial authority in a case such as the present to second-guess the [Secretary of Transportation's] judgment that a buoy rather than a daymarker was the preferable way of marking this wreck."[2]

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[2]Moreover, there is no basis in fact for concluding that the buoy was an inadequate marker, in view of the court of appeals' determination that Dr. Baxter's failure to see the buoy prior to the accident was due to his negligence in failing to maintain a proper lookout (Pet. App. 24-27 & n.13).



3. Petitioners also contend (Pet. 7-9) that the government was required to comply with the marking and removal requirements of 33 U.S.C. 409.[3] This contention was correctly rejected by the court of appeals.

Unlike the typical situation under Section 409 involving sunken vessels that constitute obstructions to navigation, this case involves the placement of a structure in a navigable channel for legitimate governmental purposes and pursuant to proper authority. As the court of appeals held (Pet. App. 16):

> The absolute prohibition in §409 against sinking a vessel in a navigable channel is obviously not intended to derogate from the federal government's power to place structures in otherwise navigable channels pursuant to its lawful authority. By the same token, the §409 requirement that a wreck be promptly removed is obviously not applicable to an obstruction which the government placed there for a proper governmental purpose

Thus, Section 409 is not controlling here.

This case involves the application of the statute's unambiguous terms to rather unusual facts. Petitioners

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[3]33 U.S.C. 409 provides in pertinent part:

> [W]henever a vessel, raft, or other craft is wrecked and sunk in a navigable channel, accidentally or otherwise, it shall be the duty of the owner of such sunken craft to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the neglect or failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner of such sunken craft to commence the immediate removal of the same, and prosecute such removal diligently * * *.

have not cited a single case (and we have found none) in which the question of the applicability of Section 409 has arisen in a similar context. The issue is thus not likely to recur and is not sufficiently important to warrant review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
*Solicitor General*

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